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IN THE
COURT OF APPEALS OF INDIANA

TOWN OF ARGOS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 50A03-0604-CV-166
	)	
HAROLD D. STEVENS and	)	
VERNA L. STEVENS,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE MARSHALL SUPERIOR COURT NO. 1
The Honorable Robert O. Bowen, Judge
Cause No. 50D01-0509-PL-22

April 4, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant-Defendant, Town of Argos ("Argos"), appeals from a judgment entered in favor or Appellees-Plaintiffs, Harold and Verna Stevens, upon their complaint seeking enforcement of an ordinance with respect to installation by Argos of certain capital improvements to parcels of land owned by the Stevenses. Upon appeal, Argos presents two issues for our review: (1) whether the trial court erred in concluding that Argos was obligated to provide certain capital improvements to parcels of land owned by the Stevenses; and (2) whether the trial court overstepped its authority in granting relief to the Stevenses.

We affirm.

The stipulated evidence reveals that on October 3, 2000, the Town Council of Argos ("Town Council"), located in Marshall County, Indiana, passed and adopted Resolution No. 2000-11 titled "The Annexation Plan of the Argos Town Council Annexing Certain Contiguous Territories" (the "Annexation Plan"). Stipulated Exhibit 2.[1] The Annexation Plan provided that the Town Council found it desirable to annex an area northwest of Argos which was bounded on the east by the western town boundary line and to the west by U.S. Highway 31. The southern boundary of the area to be annexed was marked by a set of railroad tracks, and the northern boundary extended north of 16th Road. Attached to the Annexation Plan was a map showing generally the area to be annexed and specifically numbering fifty-nine parcels of land ("the Territory").

[1] Prior to the bench trial, counsel for Argos stipulated to the foundation and admissibility of Exhibits 1 through 7.

The Territory included the Colonial Estates subdivision in which Harold and Verna Stevens own ten parcels of land.[2]

The Annexation Plan established a policy to provide services of a capital and non-capital nature to "the parcels of real estate" described as part of the Territory and shown on the map attached thereto. Stipulated Exhibit 2. With regard to capital improvements, the Annexation Plan provided as follows:

> "Sanitary Sewer:
>
> A part of the Territory to be annexed is already served by the Town of Argos Sanitary Sewer System. The following parcels have sanitary sewer service at the present time: Parcels 4 through 7, 12 through 17, 54, and 57 through 59. Those parcels not specifically listed above will be serviced with Town sanitary sewer service within three (3) years of the date of passage of the ordinance annexing this Territory.
>
> Town Water System:
>
> Part of the Territory is already served by the Town of Argos Water System. The following is a list of parcels which already have Town water service: Parcels 4 through 8, 12 through 16, 54, and 57 through 59. The remaining parcels not specifically listed above will be provided with Town water service within three (3) years of the date of the passage of this ordinance annexing these parcels.
>
> The cost to provide both sanitary sewer and water service to the parcels which do not yet have said services is estimated to be Five Hundred Thousand Dollars ($500,000.00).
>
> Electric Service:
>
> Part of the Territory is already served by the Town of Argos Electric Utility Service. The following parcels are currently serviced by Town electric: Parcels 1 through 25, 46 and 49 through 59. The remaining parcels not specifically listed above shall be serviced by Town electric service within three (3) years of the date of passage of the ordinance annexing this Territory. The cost to bring electric service to these parcels

[2] The Colonial Estates subdivision was platted and partially developed before the Annexation Plan was adopted by the Town Council. The Stevenses are apparently the developers of the subdivision. As numerically identified on the map of the Territory, the Stevenses own parcels 20, 22, 23, 32, 33, 34, 35, 36, 37, and 40, all within the Colonial Estates subdivision.

> has been estimated to be Sixty Thousand Dollars ($60,000.00)." Stipulated Exhibit 2.

The Stevenses did not object to nor remonstrate against the stated policy regarding the Services, believing that the Annexation Plan provided for the extension of the services to each parcel of land identified on the map of the Territory to be annexed, including the ten individual parcels located within the Colonial Estates subdivision which they own.

On January 2, 2002, the Town Council annexed the Territory by passing Ordinance No. 2001-01 ("the Ordinance"), which adopted the Annexation Plan. Attached to the Ordinance was a map showing generally the area to be annexed, which was consistent with the map attached to the Annexation Plan. With respect to the services provided for in the Annexation Plan, the Ordinance provided as follows:

> "Services of a capital improvement nature, including sewer facilities and electric service to be extended to the boundaries of the annexed Territory as per the Plan to the annexed Territory within three (3) years of the effective date of the annexation <u>in the same manner as those services provided to areas within the Town of Argos</u> which have similar topography, patterns of land utilization, and population density, and <u>in a manner consistent with Federal, State and local office procedures in filing criteria</u>." Stipulated Exhibit 1 (emphasis supplied).

Thereafter, Argos extended the services to the area between the old town limit and U.S. Highway 31 and along 16th Road to a point touching upon the Colonial Estates subdivision. Argos did not extend the services to each individual parcel located within the Colonial Estates subdivision, believing that it had met its obligation by extending the services such that they were available for the developer of the subdivision to access if the developer chose to extend the services to the individual lots within the subdivision.

In July of 2005, after the three-year time period within which Argos had to provide the services,[3] the Stevenses requested that Argos make the sewer connections and extend the services to all of their individual parcels of land located within the Colonial Estates subdivision. At the Town Council meeting on September 7, 2005, the Town Council denied the Stevenses' request. Thereafter, on September 16, 2005, the Stevenses filed a complaint seeking enforcement of the Ordinance as it specifically related to provision of the services to their parcels of land within the Colonial Estates subdivision. A bench trial was held on November 14, 2005. On January 19, 2006, the trial court entered an order finding that Argos had failed to show a valid, justifiable reason for not following the Annexation Plan and subsequent Ordinance with regard to the services to be provided to the "parcels of real estate." Appellee's Appendix at 21-22. The trial court ordered that Argos "implement the fiscal plan and provide the services as set out in [the Annexation Plan] prior to December 1, 2006." Appellee's Appendix at 22. Argos filed a motion to correct error, which the trial court denied after a hearing.

It is clear from the trial court's order that it accepted the Stevenses' claims insofar as the Stevenses argue that the Annexation Plan and Ordinance adopting it clearly provide that Argos was obligated to provide the services to each individual "parcel of land" identified on the map as part of the Territory to be annexed, including each individual parcel of land located within the Colonial Estates subdivision. The Stevenses support their argument by noting the fact that each individual parcel of land within the

[3] The Ordinance annexing the Territory was effective as of January 2, 2002. Per the Annexation Plan and the Ordinance, Argos was to provide the services to the Territory within three years of such date, i.e. January 2, 2005.

Colonial Estates subdivision is enumerated as a separate parcel on the map attached to the Annexation Plan. Further, the Annexation Plan specifically identified which parcels of land, as separately enumerated on the map attached to the Annexation Plan, have already been provided with the services and then provides that the "parcels not specifically listed . . . will/shall be serviced/provided with" sanitary sewers, water service, and electric service. Finally, the Stevenses point out that the Colonial Estates subdivision was platted and partially developed prior to the Annexation Plan and that each parcel of land is separately taxed.

Upon appeal, Argos contends that the trial court wrongly determined that the Annexation Plan and Ordinance required Argos to provide the services to each individual parcel of land within the Colonial Estates subdivision. Argos first directs us to Indiana Code § 36-4-3-13(d)(5) (Burns Code Ed. Supp. 2006), which provides as follows:

> "That services of a capital improvement nature, including street construction, street lighting, sewer facilities, water facilities, and stormwater drainage facilities, will be provided to the annexed territory within three (3) years after the effective date of the annexation in the same manner as those services are provided to areas within the corporate boundaries, regardless of similar topography, patterns of land use, and population density, and in a manner consistent with federal, state, and local laws, procedures, and planning criteria." (Emphasis supplied).

This provision is found within a statute providing that when certain requirements are met, a trial court is required to order a proposed annexation to take place. See I.C. § 36-4-3-13(a). Subsection (d) sets forth the requirements of the fiscal plan, and the provision set forth above more specifically refers to the requirements of the fiscal plan with regard to

services of a capital improvement nature.[4] Argos asserts that it has not provided the services to individual lots within a subdivision located within the town boundaries, and that, pursuant to subsection (d)(5), it is not obligated to provide the services to individual lots within the Colonial Estates subdivision because to do so would be in a manner inconsistent with how those services were provided to areas within the town's boundaries. Other than making this assertion, however, Argos has not presented any evidence establishing such to be true. Without evidence demonstrating the manner in which Argos has provided subdivisions within the town's boundaries with such capital improvement services, we are not inclined to conclude that to provide such services to the parcels of land within the Colonial Estates subdivision would not be in the same manner as Argos has supplied such services to areas within the town's limits.

Additionally, Argos maintains that at the time the Annexation Plan was adopted by resolution of the Town Council, it had in force a "Subdivision Control Ordinance" which apparently requires developers of subdivisions to install, at their own expense, capital improvements to the individual lots within their subdivision. Argos maintains that, consistent with the policy enunciated in the Subdivision Control Ordinance, developers of subdivisions within the town's boundaries have, at their own expense, installed capital improvements to the individual lots within their subdivision from the point where Argos provided the capital improvement services to the subdivision. Referring back to I.C. § 36-4-3-13(d)(5), Argos asserts that because the services are to be

[4] We note that the language of the Ordinance is at odds with the statutory provision concerning the providing of services "regardless of similar topography, patterns of land use, and the population density . . . ." The discrepancy, however, is not at issue in the case before us.

provided "in a manner consistent with federal, state, and local law, procedures, and planning criteria," it was under no obligation to provide the services to the individual lots within the Colonial Estates subdivision because such would have been in violation of Argos's Subdivision Control Ordinance.

While Argos contends that the Subdivision Control Ordinance relieves it of its obligation to provide the services to parcels of land within the subdivision, the Stevenses argue that the Subdivision Control Ordinance is not relevant to the matter at issue. The Stevenses maintain that the Subdivision Control Ordinance would only become relevant if one of the fifty-nine enumerated parcels within the Territory was to be subdivided following the annexation. As noted above, the Colonial Estates subdivision was platted and partially developed prior to the adoption of the Annexation Plan, and the individual parcels of land located with the subdivision were enumerated as separate parcels of land within the Territory to be annexed. We are, however, unable to address the competing interpretations of the Subdivision Control Ordinance or decide its applicability to the instant case because Argos did not introduce into evidence the Subdivision Control Ordinance nor was the trial court requested to take judicial notice of the Ordinance. See Ind. Evidence Rule 201(b). Argos merely made cursory reference to an ordinance during its argument to the court and proffered its own unsupported conclusion as to the provisions of such ordinance**.** We therefore cannot conclude that under I.C. § 36-4-3-13(d)(5), the Subdivision Control Ordinance relieved Argos of an obligation to provide the services to the parcels of land within the Colonial Estates subdivision.

Next, Argos directs us to Indiana Code § 36-4-3-16 (Burns Code Ed. Supp. 2006), which sets forth the procedures in the event there are allegations that a town has failed to implement a plan. Under this statute, and as pertinent to this case, the Stevenses, as plaintiffs, must establish "[t]hat the municipality has without justification failed to implement the plan required by section 13 of this chapter within the specific time limit for implementation after annexation." I.C. § 36-4-3-16(b)(1) (emphasis supplied). Interpreting this provision is Salmon v. City of Bloomington, 761 N.E.2d 440 (Ind. Ct. App. 2002). Argos argues that it is in the same position as was the City of Bloomington in the Salmon case.

In Salmon, residents of a subdivision annexed by the City of Bloomington filed a complaint for disannexation or other appropriate relief, arguing, in part, that the City "without justification failed to implement the [written fiscal] plan" by not providing sanitary sewer service within the time specified. 761 N.E.2d at 444-45; see I.C. § 36-4-3-16(b)(1). The City did not dispute that it had not provided the sanitary sewer service as provided for in the fiscal plan, but maintained that it followed a municipal policy regarding extension of sewer service to neighborhoods. The City thus argued that it complied with the fiscal plan by virtue of its compliance with the municipal policy.

Upon review of a grant of summary judgment in favor of the City of Bloomington, this court noted that the fiscal plan could have been more clearly written in that there were two reasonable interpretations of the language used, including that the fiscal plan could be read to suggest that sewer hook-ups would be made available regardless of the

City's compliance with the municipal policy. Id. at 444. To the extent the fiscal plan could be interpreted as such, the court could not conclude that the City did not breach the fiscal plan. Id.

Nevertheless, the court continued, addressing the plaintiff's burden under the statute to establish that the City acted "without justification." Id. at 444-45. The court noted that the municipal policy was discussed at City Council meetings, its provisions were explained to those in attendance, and that the residents in attendance were put on notice that the City intended to follow those provisions. The court further noted that the fiscal plan, although inartfully worded in some respects, clearly provided that the City would not pay the cost of constructing the sewer extension and that the cost would be borne by the residents so affected, and that residents did not remonstrate against such provision. In accordance with the municipal policy, the City proceeded to design and receive cost estimates, investigated an alternative sewer design, and offered an alternative payment plan. Only upon receiving no response from the affected residents as to their choice of alternatives, did the City cease to take further action. The court therefore concluded that the facts established the prima facie existence of justification for the City's failure to provide sewer main hook-ups within three years of the annexation. Id. at 445. The Salmon court then noted policy concerns for its decision, that is, it would be unreasonable and a waste of government resources for the City to have moved forward with a costly capital improvement project, the cost of which was to be entirely paid for by the benefiting party, without first obtaining assurances that the property owners were willing to pay for the project. Id.

Argos asserts that like the City of Bloomington in the Salmon case, it too followed a local ordinance, namely the Subdivision Control Ordinance, and that such serves as justification for its failure to extend the services to the individual lots within the Colonial Estates subdivision. Argos therefore asserts that it had a good faith position that it was not required to extend the services and therefore, the Stevenses failed to meet their burden of establishing that Argos acted "without justification."

The Stevenses argue that the Salmon case is distinguishable from the present situation. We agree. The plan in Salmon provided that the residents benefiting from the extension of sewer services would bear the cost of such extension, and the City took substantial steps to fulfill its obligation under the plan and, as found by the court, was clearly justified in not providing sewer hook-ups without assurances from those who were charged with paying the cost.[5] Further, it was clear from the record before the court in the Salmon case that the municipal ordinance at issue was discussed at City Council meetings, that the residents in attendance were aware of its provisions, and that the residents were on notice that the City intended to rely upon the municipal ordinance.

Here, the Annexation Plan is written such that a clear and reasonable interpretation thereof is that Argos obligated itself to provide the services to each individual parcel of land identified, including the parcels of land within the Colonial Estates subdivision which were not connected to the services by the extension of services as provided by

[5] No contention is made here, such as was made in Salmon, that the requirement to "provide" services merely meant that the City had to make such services "available" to the residents of the area to be annexed.

Furthermore, the fiscal plan in Salmon specifically stated that the sewer mains would be "available for hookup to the Annexation Area's properties." 761 N.E.2d at 444.

Argos. Further, there is nothing in the record indicating that the Subdivision Control Ordinance relied upon by Argos was ever discussed at Town Council meetings or that the Stevenses were on notice that the Town intended to comply with it. What we are faced with in this case is essentially a misinterpretation on Argos's part as to what it clearly obligated itself to provide with respect to the services under the terms of the Annexation Plan. Argos's misinterpretation is not justification for its failure to extend the services as it obligated itself to do. We therefore conclude that the Stevenses have met their burden of establishing that Argos acted "without justification."

Finally, Argos submits that the trial court committed an error of law in fashioning relief which is contrary to I.C. § 36-4-3-16. Subsection (c) of that statute sets forth the relief a court may grant for a municipality's failure to implement a fiscal plan as related to annexation. Specifically, a trial court may:

> "(1) grant an injunction prohibiting the collection of taxes levied by the municipality on the plaintiff's property located in the annexed territory;
> (2) award damages to the plaintiff not to exceed one and one-fourth (1 1/4) times the taxes collected by the municipality for the plaintiff's property located in the annexed territory;
> (3) order the annexed territory or any part of it to be disannexed from the municipality;
> (4) order the municipality to submit a revised fiscal plan for providing the services to the annexed territory within time limits set up by the court; or
> (5) grant any other appropriate relief." I.C. § 36-4-3-16(c).

Here, the trial court ordered Argos to implement the fiscal plan in accordance with its interpretation that the fiscal plan provided that the services would be extended by Argos to the "parcels of real estate," including the individual parcels located within the Colonial Estates subdivision which were owned by the Stevenses prior to December 1, 2006.

Argos contends that the trial court did not have authority to order it to provide the services to the individual parcels, but that it could only grant relief as set forth above. Argos further asserts that the trial court violated the separation of powers doctrine by ordering Argos to provide the services.

Although the Stevenses maintain that the relief granted by the trial court is a "variation" of subsection (c)(4), we think the relief fashioned by the trial court more appropriately falls within the court's authority to "grant any other appropriate relief" under subsection (c)(5). In ordering Argos to comply with the Annexation Plan, the court was not substituting its judgment for that of Argos. While it may be true that there is no absolute duty for a municipality to provide sanitary services to an annexed territory,[6] the decision to annex the fifty-nine parcels of land within the Territory and to provide those parcels of land, including each individual parcel of land within the Colonial Estates subdivision, with the services was a legislative decision made by the Town Council of Argos. Here, Argos created its obligation to provide such when it passed the Annexation Plan and Ordinance for the annexation of the parcels of land within the annexed Territory. The Town Council, as part of its legislative function, gave due notice, conducted public hearings, and passed an Ordinance adopting the Annexation Plan. We cannot say that the trial court overstepped its statutory authority to grant appropriate relief when it ordered Argos to comply with the Annexation Plan in the form adopted by the Town Council. We likewise cannot conclude that the trial court overstepped its constitutional authority by ordering Argos to comply with its own legislative enactment.

[6] See Chidester v. City of Hobart, 631 N.E.2d 908 (Ind. 1994).

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.